

Several Problems Concerning the Extension of the Concept of “Employer” in the Multiple Business Structure - 高木

# Several Problems Concerning the Extension of the Concept of “Employer” in the Multiple Business Structure

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## 1 . Introduction

In Japan, the problem of the extension of the concept of “employer” became a popular topic to be discussed in the latter half of the 1960’s and nowadays it has been one of the most controversial issues both in the labor movement and our labor law academic circle. The purpose of this article is to make clear that (1) why this problem has become an important topic to be solved, (2) how it has been discussed by the courts and the Labor Relations Commission ( hereinafter LRC ) of our country and (3) how it can be solved.

In short, this question is whether or not the term “employer” can be extended to a person with whom no contract of employment is made directly and how far the notion of “employer” can be extended both in the field of the Unfair Labor Practice ( hereinafter ULP ) and of the Employer-Employee relationships. And this is mostly raised in the multiple business structure, especially in the relationships between a parent company and the employees of its subsidiary company ( or a labor union representing them ).

The followings are the typical examples of the disputes which have been frequently taking place under the situation.

- (1) A unionized subsidiary company (B) is closed down by the order of its parent company (A) who hates the union activities in B and all the employees of B are discharged.

In that case is A responsible for ULP filed by a labor union representing employees of B ?

- (2) During a time of economic recession , B is closed down by the order of A and all the employees of B are discharged.

In that case, is A responsible for employment of the discharged employees of B ?

- (3) A contracts out some works to a subcontractor (B) within the premises of A and the employees of B (C) perform their work under the control of A’s supervisors, not B’s.

During the time of economic recession, A terminates or refuses to renew a contract agreed with B and C lose their jobs.

In that case, can C work in A’s workshops ?

## 2 . Economic and Social Background

The multiple business structure became predominant toward the end of the 1960's in accordance with the decline of high economic growth. To cope with the expected economic decline many corporations were more likely to separate their divisions into new incorporated companies. When they attempted to launch out into local areas or to start multilateral management, they resorted to setting up subsidiary companies. At the same time, the regrouping of subcontractors was also widely promoted. Thus, numbers of stratified enterprise groups have been formulated over the country.

This change of business structure has caused the labor problems related to the expansion of the concept of “employer”. The typical examples are as follows.

### (1) A case concerning “Yuchi-Kigyo ( Enterprises launched out into local areas )”

In Japan, since the middle of the 60's when a high economic growth came to its peak, “ industrialization of agricultural areas” has been taken as one of the most important steps in national industrial policy which was typically shown in the so-called “ The Japan Islands Reconstruction Project” advocated by ex-premier Tanaka Kakuei.

Local governments, especially in underdeveloped districts such as “Tohoku( northern part of Japan )”, made every efforts to draw enterprises from the industrialized areas ( e.g., reduction of taxes, supply of lands , water and electricity) in order to improve their standard of living by promoting industry. By this, they can also reduce the number of “Dekasegi ( seasonal workers )” to enterprises in urban areas which has caused serious labor and social problems in the communities.

Contrary to their expectations, however, “Yuchi-Kigyo” generally tended to close down the shops or to discharge a large number of employees at one time when they faced some managerial difficulties during the time of recession or when their employees were organized by labor unions. This is mainly because their principal motive to launch out into districts is to secure cheap labor and on the whole they don't have a sense of responsibility to the community. In the time of so-called “Oil Shock”, evils of this kind burst out among “Yuchi-kigyo”.

The most important point here in relation to our discussion is that as “Yuchi-Kigyo”, in many cases, operate as separate corporations, rather than divisions or plants of parent companies, this style of management usually intends to secure such managerial advantages of a parent company as follows :

- (a)to secure cheap labor in districts by setting up a different wage system in a subsidiary company ;
- (b)to make it easy to close down a subsidiary company or to reduce its personnel during the time of economic recession ;
- (c)to make it easy to restrain or interfere in the union activities in a subsidiary company through remote

control over it.

## **(2) A case concerning “Subcontract on the Premises of a Parent Company”**

Contracting out some workers previously performed by employees of a parent company to subcontractors or newly-established subsidiary companies making them render services on the premises of a parent company ( hereinafter “Subcontract on the Premises” ) has also become popular among industries as one of the most effective ways for enterprise rationalization.

In many cases “Subcontract on the Premises” can be shown among indirect divisions of manufacturing such as transportation, packing, guarding, maintenance, or welfare, while in steel, shipbuilding or broadcasting industries it has been employed even in the direct divisions of manufacturing.

The question here lies in the point that the employees of a subcontractor perform their work with the employees of a parent company in the same working place ( We usually call these workers “ Shagai-Ko” in Japan) and in many cases they perform their work under the control of the supervisors of a parent company as is typically shown in recent broadcasting industry. Where a supervisor of a subcontractor independently directs and supervises the work performance of “ Shagai-Ko” as is traditionally the case in the shipbuilding industry, it does not raise any legal questions as regards our topic.

In the former case, however, “ Shagai-Ko” are normally incorporated into the integrated unit of production line, so that nobody distinguish them from the employees of a parent company. This situation is typically presented in the cases where a subcontractor actually conducts a labor supply project and it can’t be deemed as an independent contractor ( Employment Security Law § 44 prohibits labor supply of this kind for the purpose of excluding labor broker except by labor union ).

The most controversial issue lies in the point that when a parent company wants to reduce their work force, the company can easily achieve its purpose by terminating or refusing to renew the contract signed with a subcontractor without taking a form of “ discharge”, notwithstanding that it controls “ Shagai-Ko” as if they were its own employees. That is only because “ Shagai-Ko” are outwardly employed by an incorporate subcontractor, that is, a distinct person from a parent company.

The same is true of the cases of “ Rinji-Ko ( temporary workers )” or part-time workers. Although “ Rinji-Ko” are employed under a contract of employment fixed by short periods ( e.g., 1 month or 6 months), the contract is in most cases renewed automatically so many times that it virtually becomes tantamount to a contract without any set period which is normally signed with “ Hon-Ko ( regular workers )”. Accordingly, it may fairly be said that “ Rinji-Ko” are usually incorporated into regular work force needed for ordinary business operation in enterprises.

During the time of economic recession, however, employers are most likely to exclude these workers

at the very beginning as well as , “ Shagai-Ko” by refusing to renew the contract on the ground of expiration of the set period. Here, the question of discharge ( cancellation of the contract of employment ) is also ingeniously avoided.

In other words, the legal formalities such as “juristic person” or “ period of contract” are ingeniously employed to the best advantages in order to be freed from some employer’s liabilities.

### **(3) A case concerning “Wage Nonpayment or Workmen’s Compensation in the Civil Engineering and Construction Industry”**

The civil engineering and construction industry (hereinafter, construction industry) traditionally has had a stratified subcontracting structures with large numbers of small firms at its bottom where feudalistic labor relations still remain to a large extent. Among them there are many small incorporate subcontractors that are kin to “ labor brokers”, virtually having no structural substances as an enterprise. Most of the wage nonpayment cases usually have taken place under this structure. But another important thing here is that victims are, in most cases, “Dekasegi” workers ( seasonal workers from agricultural areas, especially northern part of Japan. The number of them exceeded one million at its peak – 1970). They usually work in the factories in urban areas during their leisure season and after that they return to their homes. They are essentially farmers and distinct from well-trained factory workers. In addition to that, they are more likely to concentrate on the construction industry ( automobile industry is also popular among them ), mainly because they can get much more money in a short period without any special skill. The combination of these factors has caused the labor problems characteristic of “Dekasegi” workers and wage nonpayment cases are typical examples of them.

In “ fly-by-night”( typically occurs in wage nonpayment cases ) cases, it is actually difficult for them to get unpaid wages from the subcontractor, they have no choice but to claim it to a general contractor under which several times contracts are concluded to carry on a certain undertaking.

With respect to workmen’s compensation cases, Labor Standard Act ( hereinafter LSA ) has already solved the problem by prescribing a special provisions to the effect that “ when the enterprises as prescribed by Order are carried on under several times contracts, the general contractor shall be deemed as the employer as far as accident compensation is concerned.” In wage nonpayment cases, however, there is no such provision in LSA, so that we are necessarily required to solve this problem in a theoretical way.

As the whole story shows, this issue has taken place under such social and economic circumstances that a genuine solution could not otherwise be reached without seeking to pursue legal responsibilities of

a “main figure behind a scene”. In other words, the question here is whether or not a legal fiction or label such as “juristic person” can take the workers from the protection of law and if not, by what theory and to what extent they can be protected.

### **3 . The Orders of the LRC and the Decisions of the Courts**

#### **(1) The Concept of “Employer” in the field of ULP**

The discussion concerning the expansion of the notion of “employer” has been most popular in the area of ULP, since there is in the Labor Relations Act ( hereinafter LRA) no definition that solves problems as to the limits of “employer” which the Act prohibits to engage in ULP ( § (7)—(1)~(4) ).[ cf. NLRA § 2(2) “the terms ‘employer’ includes any person acting as an agent ( in the interest ) of an employer , directly or indirectly, .....].

Until the beginnings of the 70’s, LRC and the courts had conventionally held in such way that in what circumstances an employer could be held responsible for ULP where supervisors, non supervisory employees or the third person ( typically a parent company ) were engaged in conduct prohibited under § 7. Here, they deemed a term “employer” to be identical with a party of a contract of employment. In other words, under this view, a supervisor or a third person can’t be responsible for ULP independently, so that it has nothing to do with the questions of expanding the notion of “employer”.

In Daiho-Unyu Co. case (1972) , however, Osaka-Chiroi ( Osaka Prefectural LRC ) held that “employer” who is responsible for ULP should be expanded even to a third person other than a party of a contract of employment, where a person has a “ substantial influence or control over such a labor relations policy of other company as determination of wages, working hours or other working conditions.” This order is based on the understanding that the fundamental purpose of the ULP system which derives from the Constitution § 28 lies in eliminating the anti-union conduct of “employer”, not in charging an employer’s liability on a contract of employment.

Since this order presented, many orders and court decisions followed this test in similar cases and nowadays it has become a most influential theory in determining the scope of “employer” to be responsible for ULP. In determining whether a person has “ a substantial influence or control over labor relations policy” so as to make a person responsible for ULP, most cases have considered such factors as ; (a) common ownerships, (b) the integration of the business operations, (c) common control of labor relations, (d) common executives, (e) financial aids such as lands, plants, facilities and so on.

**(2) The concept of “Employer” in the field of the employment relation( individual contract of employment )**

In this area it used to be considered difficult to expand a scope of “employer” to a person with whom a contract of employment is not directly concluded, since it necessarily conflicts with the conventional concept of “contract” in civil code. In other words, so far as a contract of employment is also one of the contracts in civil code, it doesn’t become effective without any agreement between two parties. Accordingly, in order to recognize an agreement also between an employees of a corporate subsidiary ( or subcontractor ) and a parent company, we need either a provision of the statute or some other theoretical mediums.

As the definition of “employer” under the LSA § 10 is not so clear as to answer this question, the courts have been generally reluctant to acknowledge this relation between them. ( § 10 “ In this Act, the employer is defined as the owner or manager of the enterprise or any other person who acts on behalf of the owner of the enterprise in matters concerning the workers of the enterprise.”)

Recently, however, there are some court decisions that acknowledged the employer’s liability of a parent company also in this field. They are classified into two groups. Those are : (a) the group which applied a “ disregarding the corporate fiction” doctrine to make a parent company responsible for the unpaid wages of its subsidiary’s employees ( Kawagishi-Kogyo Co. case,1970,Sendai D.C.) or for the employment of the discharged employees of its subsidiary ( Funai-Denki Co. case, 1975, Tokushima D.C.).

(b) the group which recognized the existence of an implied contract of employment between a parent company and “ Shagai-Ko”.

Both decisions in the first group are related to the cases of closedown of corporate subsidiaries that launched out into the districts and Kawagishi case attracted a big attention as the first case which applied the “ disregarding the corporate fiction” doctrine having developed in the commercial law field to the labor relations.

On the other hand, most decisions of the second group are related to the “ Shagai-Ko” case [ Shinkonan-Kozai Co. case, 1972, Kobe D.C.—first case] and in determining whether or not an implied contract of employment is present between a parent company and “ Shagai-Ko”, they have commonly considered the existence of “ Abhängige Arbeit” ( elements of subordinate work ) between them. The question presented in these cases is what kind of elements should constitute “subordinate work”. Although no absolute rule for determining it, the courts seem to have taken the following factors as decisive :

Those are – (a) who has the right to direct or control the work performance of “ Shagai-Ko” as to

what shall be done, when and how it shall be done ; (b) the independent nature of the subcontractor ; (c) whether or not the remuneration shall be paid for the result of the work or for work itself.

#### **4 . Conclusion**

(1) My short conclusion on this matter is that under the situation above-mentioned we should read into the term “employer” a test of “economic realities” which are technically screened by legal forms, and expand the concept of “employer” to some extent both in the field of ULP and of the employment relation. And in discussing this topic, we should first distinguish between the field of ULP and that of employment relation, because each is regulated by its own principle.

(2) In the area of the employment relation, we should reconsider the question “ what is contract of employment ?”, in other words, “ what are the elements inherent in it ?”. From my point of view that its essence consists of “ performing subordinate labor” and “ receiving wages as the remuneration for it,” so far as these elements are shown, we can conclude the existence of a contract of employment even between parties where no explicit ( in written or in oral ) is made.

And in determining the concept of “employer”, these two elements may be replaced by the following test that who has the authority to (a) make conclusive decisions on working conditions such as wages, working hours and so on, (b) to direct and supervise the work performance and (c) to manage personnel affairs such as hiring, discipline or discharge.

(3) The scope of “employer” under ULP area should be expanded much more than the former, because the ULP system intends to exclude the employer’s anti-union conducts, not to pursue the employer’s liability on the contract of employment. In that sense I support the current views of the LRC and the courts decisions. However, the test of “substantial influence or control over the labor relations policy such as wages, working hours or other working conditions” are not sufficient enough to cover every type of ULP designated in LRA § 7(1) - (4), because from my viewpoints just mentioned above [4(2)], this test still seems to premise the existence of a contract of employment on its base.

In my opinion, the scope of “employer” here should be determined respectively in accordance with the type of ULP. For example, in case of § 7(1)[ employer discrimination-e.g., discharge of employees] the scope of employer should be limited to a person who has a right to determine it. So in most cases “employer” will be a party of a contract of employment.

On the other hand, in case of § 7(2) ( refusal to bargain ) we should regard as “employer” a person who has an ability to solve the subject matters of collective bargaining.

本稿は、筆者が1979年8月から1980年7月にかけて米国ミシガン大学ロースクールに客員研究員として留学した際に、当時同大学に留学中の伊藤真氏（現東京大学教授・民事訴訟法、当時は名古屋大学助教授）の発案による日米比較法研究会で、筆者が報告したディスカッション・ペーパーを掲載したものである。当時、ミシガン大学ロースクールには、岸田雅雄氏（現早稲田大学法科大学院教授・商事法、当時は神戸大学助教授）、丸田隆氏（現関西学院大学法科大学院教授、当時は甲南大学助手。陪審制度の研究で著名）、巽 高英氏（現警察庁長官官房審議官）をはじめ、各界から新進気鋭の日本人留学生が学んでおり、お互いに切磋琢磨しうる環境が整っていたこともあり、単に向こうから学ぶだけでなく、こちらから貢献できることはないかということで、ロースクールの教員、大学院生に参加を呼びかけてこの研究会が立ち上がったものである。ロースクールの錚々たるプロフェッサーも交えてのコロキウムでは、自分の決定的な語学力不足もあり、終始借りてきた猫を決めこんだわけであるが、参加者は、いずれも日本法に関心が高く研究会立ち上げは成功したとの印象を持った。

コロキウムは計5回開催され、日本側から私を含めて5名の者がそれぞれの専門分野からの報告を行なった（報告タイトルは、伊藤 真 “Comparative Analysis of Out-of-Court Insolvency Procedures in the U.S. and in Japan”，岸田雅雄 “Enforcement of Japanese Securities Regulation”，丸田隆司 “One Aspect of Products Liability Doctrine in Japan : The Establishment of Strict Duty of Care in Food Manufacturing”，巽 高英 “Police System and the Control of Organized Crime in Japan”）。

筆者は、当時の日本で新しい労働法上の理論課題として浮上してきた親子会社や企業集団における使用者概念の拡張問題を取り上げたのであったが、予想以上に反響があった。研究会に参加した労働法のSt. ANTOINE教授が、アメリカでもこのような問題は、Double-Breasted Operation（親子会社方式の経営形態を「ダブルの背広」にもじった用語）として論議されていると教えてくれたのには感激した。国と場所は違っても、利益追求という資本の論理は同じということである。帰国後、労働契約における使用者概念及び労働者概念は筆者の主要な研究テーマの一つになったが、懐かしい思い出の一コマである。